

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

SWEET GRASS INVESTMENTS, LLC,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 05-076

SUMMARY JUDGMENT ORDER

Appellant Sweet Grass Investments, LLC (“Sweet Grass”) filed an appeal of the denial of certain water right claim amendments by Respondent Washington Department of Ecology (“Ecology”). This matter was brought before the Pollution Control Hearings Board (“Board”) on cross-motions for summary judgment. Charles C. Flower and Patrick Andreotti represented Sweet Grass. Assistant Attorney General Maia D. Bellon represented Ecology. The Board consisted of Bill Clarke, Presiding, and William H. Lynch, Member. The Board held oral argument on summary judgment, and the written record consisted of:

1. Sweet Grass’ Motion and Memorandum In Support of Motion for Summary Judgment;
2. Affidavit of Charles C. Flower in Support of Sweet Grass’ Motion for Summary Judgment and Exhibits A - T;
3. Ecology’s Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment;
4. Declaration of Thom Lufkin In Support of Ecology’s Motion for Summary Judgment and Exhibits A – D.
5. Sweet Grass’ Response to Ecology’s Motion and Memorandum for Summary Judgment;
6. Ecology’s Response to Sweet Grass’ Motion and Memorandum for Summary Judgment;

- 1 7. Declaration of Maia D. Bellon in Support of Motion for Summary Judgment;
2 8. Ecology's Reply to Sweet Grass' Response; and
3 9. Sweet Grass' Reply to Ecology's Response;

4 **I. BACKGROUND**

5 **[1]**

6 On June 30, 1974, Water Right Claim No. 137444 was filed by Sweet Grass'
7 predecessor, Robert Riddle. The water claim filed by Mr. Riddle included the following water
8 right attributes:

- 9 (1) Surface water source of Wipple Creek;
10 (2) Irrigation of 80 acres of land;
11 (3) Annual quantity of 1,200 acre-feet per year (AF/yr);
12 (4) Season of use May 20 to October 20;
13 (5) Date of first use 1952;
14 (6) Point of diversion within Section 28, Township 17 N, Range 19 E.W.M.; and
15 (7) Place of use within Section 29, Township 17 North, Range 19 E.W.M.

16 The claim filed by Riddle did not state an instantaneous quantity.

17 **[2]**

18 On May 4, 2004, Sweet Grass filed an application for Amended Claim for Water Right
19 Claim No. 13744. Sweet Grass stated the reason for the amendment was to correct clerical errors
20 in the claim filed by Riddle. The amendments sought by Sweet Grass were the following:

- 21 (1) Surface water source of Wipple Creek would be amended to "Parke/Cherry Creek"
and "Parke/Johnson/Wipple Creek";
(2) An instantaneous quantity of 4.72 cfs would be claimed;
(3) The annual quantity would be amended to 1117.3 AF/year;
(4) The number of irrigated acres would be amended to 109;
(5) The season of use would be amended to April 1 to October 15;

- 1 (6) The point of diversion would be amended to include two points of diversion:
- 2 (a) Approximately 500 feet South of the Northeast corner of Section 29,
Township 11 North, Range 19 E.W.M;
- 3 (b) 20 feet North and 750 feet West of the Southeast quarter of Section 21,
Township 17 North, Range E.W.M;
- 4 (7) The place of use would be amended to the Southeast quarter of Section 29,
5 Township 17 North, Range 19 E.W.M and that portion of the South half of the
Southwest quarter of Section 29, Township 17 North, Range 19 E.W.M., lying South
6 of the Wipple Wasteway;
- 7 (8) The purpose of use would be amended to add stockwater; and
- 8 (9) The legal doctrine upon which the claim is based would be riparian.

8 [3]

9 Ecology approved Sweet Grass' request to amend the claim form by providing the
10 instantaneous quantity of water, and that riparian was the legal basis for the claim. Ecology also
11 partially approved the request to amend the source of water to Parke/Johnson/Wipple Creek, but
12 denied the request to include Parke/Cherry Creek. Ecology denied the other claim amendments
13 requested by Sweet Grass. Ecology's basis for denying these amendments was that the requested
14 amendments were not "ministerial in nature" as that phrase is used in RCW 90.14.065(3).

15 [4]

16 For each claim amendment denied by Ecology and appealed by Sweet Grass, the legal
17 issue is whether Ecology should have allowed the requested claim amendment as an amendment
18 that is "ministerial in nature" under RCW 90.14.065(3). The five different claim amendment
19 denials before the Board in this case are:

- 20 (1) Including Parke/Cherry Creek as the source of water;
- 21 (2) Amending the number of irrigated acres from 80 to 109;
- (3) Amending the season of use from May 20 to October 20 to April 1 to October 15;

1 (4) Amending the point of diversion from Parke/Cherry Creek; and

2 (5) Amending the purpose of use to include stockwater.

3 II. ANALYSIS

4 [1]

5 Summary judgment is designed to do away with unnecessary trials when there is no
6 genuine issue of material fact. *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975). In a
7 summary judgment proceeding, the moving party has the initial burden of showing that there is
8 no dispute as to any material fact. *Hiatt v. Walker Chevrolet*, 120 Wn.2d 57, 66, 837 P.2d 618
9 (1992). A material fact is one upon which the outcome of the litigation depends. *Jacobsen v.*
10 *State*, 89 Wn.2d 104, 569 P.2d 1152 (1977).

11 If a moving party does not sustain its burden, summary judgment should not be
12 granted, regardless of whether the nonmoving party has submitted affidavits or
13 other evidence in opposition to the motion. [Citation omitted.] Only after the
14 moving party has met its burden of producing factual evidence showing that it is
entitled to judgment as a matter of law does the burden shift to the nonmoving
party to set forth facts showing that there is a genuine issue of material fact.
15 *Hash v. Children's Orthopedic Hosp.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

16 [2]

17 In ruling on a motion for summary judgment, the Court must consider all of the material
18 evidence and all inferences therefrom in a manner most favorable to the non-moving party and,
19 when so considered, if reasonable persons might reach different conclusions, the motion should
20 be denied. *Id.*; *Wood v. Seattle*, 57 Wn.2d 469, 358 P.2d 140 (1960).

1 [3]

2 The Water Rights Claims Registration Act governs the filing of water right claims in
3 Washington. RCW 90.14.051 provides a list of eight items of information that must be on a
4 claim form:

5 The statement of claim for each right shall include substantially the following:

- 6 (1) The name and mailing address of the claimant.
7 (2) The name of the watercourse or water source from which the right to divert or make
8 use of water is claimed, if available.
9 (3) The quantities of water and times of use claimed.
10 (4) The legal description, with reasonable certainty, of the point or points of diversion
11 and places of use of waters.
12 (5) The purpose of use, including, if for irrigation, the number of acres irrigated.
13 (6) The approximate dates of first putting water to beneficial use for the various amounts
14 and times claimed in subsection (3).
15 (7) The legal doctrine or doctrines upon which the right claimed is based, including if
16 statutory, the specific statute.
17 (8) The sworn statement that the claim set forth is true and correct to the best of
18 claimant's knowledge and belief.

19 RCW 90.14.051.

20 [4]

21 The Water Rights Claims Registration Act also provides that a previously filed statement
of claim may be amended “if the submitted amendment is based on:

- 22 (1) An error in estimation of the quantity of the applicant's water claim prescribed in
23 RCW 90.14.051 if the applicant provides reasons for the failure to claim such right in the
24 original claim;
25 (2) A change in circumstances not foreseeable at the time the original claim was filed, if
such change in circumstances relates only to the manner of transportation or diversion of
the water and not to the use or quantity of such water; or
(3) The amendment is ministerial in nature.

RCW 90.14.065.

1 Sweet Grass sought the water right claim amendments on the basis that they were
2 “ministerial in nature” based on RCW 90.14.065(3). Ecology approved certain claim
3 amendments on the basis that they were ministerial in nature, but denied the amendments before
4 the Board in this appeal on the basis that they were not “ministerial in nature.” Ecology’s order
5 includes the following statement in response to each of the requested amendments denied by
6 Ecology:

7 The requested amendment also does not meet the criterion of being “ministerial in
8 nature.” Ecology generally interprets this phrase to mean a typographical or clerical error
9 which occurred in the act of filling out the original claim form or a change to an item of
10 information on the original claim form that conflicts with the other information on the
11 form, and which by amending that item will eliminate that inconsistency.

12 [5]

13 The Court of Appeals has previously considered the meaning of the phrase “ministerial in
14 nature” in RCW 90.14.065(3) in a case also dealing with a claim amendment from the Yakima
15 Basin. *Willowbrook Farms LLP v. Ecology*, 116 Wn.App 392 (2003), dealt with a claims
16 amendment filed to add a quarter section of land to the water right claim’s place-of-use
17 description. Ecology denied the requested claim amendment on the basis that the amendment
18 was not “ministerial in nature,” which Ecology interpreted to mean clerical or typographical.
19 On appeal, the Superior Court and then the Court of Appeals held that the claim amendment filed
20 in that case was ministerial in nature because it would correct an error that made the original
21 claim internally inconsistent. The specific error identified was the legal description. The
consequence of the error was that the original legal description was smaller than the number of
irrigated acres and quantity of water used for irrigation. By allowing the claimant to amend the

1 legal description, the quantity of water, number of irrigated acres, and legal description of the
2 place of use could be reconciled.

3 [6]

4 In *Willowbrook*, the Court of Appeals discussed the nature of a ministerial act as follows:

5
6 Black's Law Dictionary 1011 (7th ed.1999) defines "ministerial" as "[o]f or relating to an
7 act that involves obedience to instructions or laws instead of discretion, judgment, or
8 skill." An act is ministerial if the individual is performing a duty that is mandatory for the
9 person to perform and there is no discretion in how that act is performed. Burg v. City of
Seattle, 32 Wn.App. 286, 290-91, 647 P.2d 517 (1982). The duty must be defined so
precisely as to leave nothing to the exercise of discretion or judgment. City of Bothell v.
Gutschmidt, 78 Wn.App. 654, 662-63, 898 P.2d 864 (1995).

116 Wn.App. ____ (page cite not available).

10 The Court also analogized to the act of making a deed for the purchase of real property:

11
12 For example, when a potential buyer has taken all steps necessary for the purchase of real
13 property for delinquent assessments, the making of the deed is a ministerial act. See
14 Lindsay Irrig. Dist. v. Clallam County, 186 Wash. 65, 70-71, 56 P.2d 996 (1936). The
15 insertion of a name or other item in a document is a ministerial act if insertion is
mandatory. Id. at 71. If a ministerial act is performed improperly, such as by failing to
insert a name in a document when required to do so, or by inserting an incorrect name,
there is a duty to correct the error. Id. The correction of the error is itself a ministerial act.
Id.

16 [7]

17 Similarly, filling out a water right claim form also involves different types of acts, some
18 of which are ministerial, some which are not. Following the Court of Appeals' deed analogy, a
19 person may exercise judgment or discretion in determining the attributes of a water right to be
20 claimed. Once the claimant determines those attributes, the act of filling out the water right
21 claim form to include those attributes is a ministerial act. Like the making of a deed, filling out a
water right claim form is the ministerial act that if done properly, reflects the non-ministerial
actions or decisions leading up to the completion of the form.

1 [8]

2 In *Willowbrook*, the farm at issue included two different sections of land within a single
3 irrigated field. The field was not separated by fences or objects to indicate section lines. The
4 claimant determined the place of use using aerial photos because he could not access the field
5 due to a farming injury. The claimant intended to claim a water right for the entire field, but the
6 legal description in the claim form included only one of the two irrigated sections within the field
7 in the claim form. In *Willowbrook*, the exercise of judgment or discretion was the claimant's
8 decision to claim a water right for the entire field being irrigated. The claimant made an error in
9 describing the place of use of the field he had previously decided to claim. Thus, it was not the
10 claimant's discretionary action in deciding to claim irrigation of the entire field that was in error.
11 Rather, the error was committed in the act of filling out the form itself. The claim amendment
12 filed by Willowbrook was therefore "ministerial in nature" because as filed, the original claim
13 did not reflect the intent of the claimant.

14 [9]

15 While *Willowbrook* is the authoritative decision on "ministerial" claim amendments
16 under RCW 90.14.065(3), several other Board decisions issued before or during the *Willowbrook*
17 appeal considered the same issue and thus must be clarified in light of that decision. In the
18 Board's *Packwood Canal* (PCHB 98-228/229/230), *Papineau* (PCHB 02-048), and *Moeur* (02-
19 097) majority and dissenting opinions, considerable analysis was devoted to whether RCW
20 90.14.065 should be construed narrowly or broadly. The Court of Appeals' *Willowbrook*
21 decision has resolved that debate, concluding that "RCW 90.14.910 requires that we liberally
construe the act to effect its purpose."

1 [10]

2 The majority decision in *Papineau* suggests that RCW 90.14.065 itself be construed
3 narrowly because it is an exception to the general rule requiring that claims be filed by a specific
4 date including certain information to avoid relinquishment:

5 because [water right claim amendments] operate as exceptions to the relinquishment
6 statute, they must be narrowly construed. See *R.D. Merrill Co. v. PCHB*, 137 Wn.2d
7 140, 969 P.2d 458 (1999) (holding the exceptions to the relinquishment statute must be
8 narrowly construed in order to give effect to the underlying legislative intent of the
9 general provisions).

10 This conclusion was erroneous and is overruled. RCW 90.14.065 is not an exception to
11 relinquishment, but allows amendment of a previously filed claim in three situations. While
12 failure to file a water right claim results in relinquishment under RCW 90.14.071, RCW
13 90.14.065 itself is not an exception to relinquishment. Relinquishment exceptions are provided
14 at RCW 90.14.140.

15 [11]

16 In *Packwood Canal v. Ecology*, PCHB No. 98-228, 229, & 230 (1999), the Board
17 concluded that the phrase “ministerial in nature” in RCW 90.14.065 did not allow a claim to be
18 amended with a different source of water:

19 Further, the broad construction of the phrase “ministerial in nature” would convey much
20 greater authority to change a water right than the more specific scenarios directly
21 addressed by the legislature. The source of water is one of the most fundamental
components of a water right claim. It defines the water body from which the diversion
will be made and thus identifies the competing claimants in determining priority.
Allowing a change in the source of a claim conveys much broader authority for
amendment than the specifically identified terms and conditions specified in RCW
90.14.065(1) and (2). It would be inconsistent with the structure and context of these
provisions and the recognized tenants of statutory construction to interpret the phrase

1 “ministerial in nature” broadly enough to encompass a change in the source of a water
2 right.

3 In this case, however, Ecology partially approved the requested amendment to the source
4 of water claimed by Sweet Grass’ predecessor. In other words, Ecology approved Sweet Grass’
5 requested claim amendment to the source of water even though the Board’s *Packwood Canal*
6 decision concluded that such an amendment was not allowed under RCW 90.14.065(3). In the
7 *Packwood Canal* case, the Board determined that the source of water is such a fundamental
8 component of a water right that it cannot be subject to amendment under RCW 90.14.065(3).
9 While the Packwood Canal decision correctly notes that amending the source of water may take
10 on more complicated issues than claim amendments to other water right attributes, the Board
11 overrules the conclusion in *Packwood Canal* that the source of water cannot be subject to a claim
12 amendment under RCW 90.14.065(3).

13 RCW 90.14.051, and Ecology’s standard water right claim form, requires information of
14 eight subjects, six of which are water right attributes. The phrase “ministerial in nature” in RCW
15 90.14.065(3) does not discern between the importance of water right attributes or other
16 information in a water right claim form as a basis for whether it may be amended. The limits to
17 claim amendments are provided in the three subsections of RCW 90.14.065, not to particular
18 water right attributes.

19 [12]

20 In *Papineau*, the majority concluded:

21 Even were we to disregard the apparent intent of the Legislature, and consider the term
ministerial to apply to individual, non-governmental actions, we would be unable, from
the facts of this case, to conclude the statute would authorize a change in the proposed

1 claim form to include different lands for irrigation, from those provided in the original
2 claim form, where the claimed error was not evident from the face of the document.

3 The first conclusion, that the term ministerial applies only to governmental actions, has
4 obviously been overruled by *Willowbrook*, which held that an amendment by a claimant or the
5 subsequent holder of the claim may be ministerial. The concept in the second conclusion, that
6 the claimed error must be evident on the face of the document, was expanded by the Board's
7 majority decision in the *Moeur* case. This case concluded:

8 As the Board held in *Papineau*, "[i]f a mistake is apparent from looking at the face of the
9 document, then most likely this will constitute a mistake that is 'ministerial in nature.' "
10 In addition to looking at the face of the claim form and attachments to ascertain the need
11 for an amendment to correct a ministerial error, Ecology can look to see if an error is
12 evident from other documents on file with the agency.

13 *Willowbrook* further extended the basis on which an applicant may rely for a claim
14 amendment. In that case, testimony from the claimant himself was provided as to the place of
15 use the claimant intended to include on the claim form. The *Willowbrook* case and many prior
16 Board decisions on whether a claim amendment is "ministerial in nature" all involve the issue of
17 whether the claim form is consistent with the intent of the claimant. The explicit introduction of
18 claimant intent in this case is not a new development in water law:

19 The intent of the appropriator and the exercise of diligence in putting the water to a
20 beneficial use are the controlling features. These rules seem to be so well settled that we
21 deem it unnecessary to cite authorities other than Kinney on Irrigation, vol. 2 (2d Ed.) p.
686, c. 41, beginning with page 1311, and particularly sections 767, 768, and 773.

In re Water Rights in Alpowa Creek in Garfield and Asotin Counties 129 Wash. 9, 18, 224 P.
29, 33 (1924)

1 [13]

2 The Board concludes that based on the *Willowbrook* decision, and prior Board decisions
3 as discussed in this decision, the following considerations apply as to whether a requested claim
4 amendment is ministerial in nature. First, if the claim amendment seeks to correct a clerical error
5 such as transposed numbers, information provided in the wrong place on the claim form, or
6 information not previously provided in a claim form that substantially meets the requirements of
7 RCW 90.14.071, the amendment is most likely “ministerial in nature.” These types of
8 amendments are ministerial because they correct errors that are obvious based solely on review
9 of the claim form itself. Secondly, if the claim amendment seeks to change attributes of the
10 water right because of claimant error or inaccuracy, such claim amendment may be “ministerial
11 in nature” if the information on the claim form was incorrect at the time the claim form was filed
12 and the error was committed by the claimant not in the exercise of judgment or discretion, but in
13 the act of filing out the water right claim form itself.

14 In either case, the burden is on the applicant to demonstrate that the claim amendment is
15 ministerial in nature. Consideration of the intent of the claimant, and placing the burden on the
16 claim amendment applicant to show that claim form was contrary to the intent of claimant, is
17 consistent with the conclusion in *Willowbrook* that making a deed, or later correcting that deed if
18 an error was made, is a ministerial act. In such an example, the burden is upon the party seeking
19 deed reformation to show that a mistake was made. *Wilhelm v. Beyersdorf*, 100 Wn.App 836,
20 843-844 (2000).

1 [14]

2 Like the claim amendments allowed in *Willowbrook* case, the applicant's burden of proof
3 is to show that what the claimant wrote on the claim form is different than what the claimant
4 intended. While the passage of time associated with water right claims may make the burden of
5 showing the claimant's intent difficult to meet, such evidentiary difficulties are common with
6 issues involving Chapter 90.14 RCW.

7 [15]

8 With this framework for analysis in place, we then turn to the five claim amendments
9 denied by Ecology before the Board in this appeal. They are:
10

- 11 (1) Including Parke/Cherry Creek as the source of water;
12 (2) Amending the number of irrigated acres from 80 to 109;
13 (3) Amending the season of use from May 20 to October 20 to April 1 to October 15;
14 (4) Amending the point of diversion from Parke/Cherry Creek; and
15 (5) Amending the purpose of use to include stockwater.

16 [16]

17 The Board concludes that on issues 1 – 4, there is not a basis to grant summary to either
18 Ecology or to Sweet Grass. Based on a review of the claim form filed by Mr. Riddle, none of
19 these four requested claim amendments corrects clerical errors or provides information missing
20 from the form. The claim amendments sought by Sweet Grass to include information not
21 originally included by Riddle were approved by Ecology.

1 Sweet Grass argues that these requested amendments would make the claim more
2 internally consistent, and that the changes are therefore ministerial in nature. Ecology contends
3 that the amendments do not make the claim form more consistent. Simply because a claim
4 amendment makes a claim form more consistent does not mean the amendment is ministerial in
5 nature as a matter of law. Like in *Willowbrook*, whether a claim amendment to make a claim
6 form internally consistent is “ministerial in nature” depends on whether the intent of the claimant
7 is accurately reflected in the claim form. On summary judgment, Sweet Grass has not met its
8 burden of proof that the claim does not reflect the claimant’s intent at the time the claim was
9 filed, and Ecology has not established that Sweet Grass cannot meet this burden. Thus, these
10 four claim amendment denials require an evidentiary hearing.

11 [16]

12 On the claim amendment to add stockwater to the purpose of use, Ecology is entitled to
13 summary judgment. On this issue, the facts before the Board are not in dispute and support
14 judgment as a matter of law. On June 28, 1974, Riddle, the original claimant filed two water
15 right claims. In addition to the claim at issue in this case, Riddle filed Water Right Claim No.
16 137445. In the purpose of use section of Claim No. 137445, Riddle listed “Domestic (1 House)
17 – Stockwater.” Thus, it is apparent that Riddle used this claim for stockwater purpose of use.
18 Water Right Claim No. 137444, to which Sweet Grass seeks to amend stockwater as a purpose of
19 use, was not intended to be claimed for stockwater purpose. This is because Claim No. 137444
20 was claimed only for seasonal use, and because stockwater was claimed by Riddle on a different
21 claim.

1 [17]

2 The water right attributes for which Sweet Grass seeks claim amendments under RCW
3 90.14.065 are presently subject to evidentiary review in *Acquavella*. Should the matter proceed
4 to hearing, the Board requests briefing from the parties on the consequence of claim amendments
5 by Ecology under RCW 90.14.065 when the validity and extent of the water right is being
6 adjudicated in *Acquavella*.

7 BASED ON THE FOREGOING ANALYSIS, THE BOARD ENTERS THE FOLLOWING
8

9 **ORDER**

10 Ecology's Motion for Summary Judgment on the stockwater issue is GRANTED.
11 Ecology's and Sweet Grass' Motions for Summary Judgment on other issues in the appeal are
12 DENIED and will be decided after hearing.

13
14 SO ORDERED this 3rd day of October 2005.

15 **POLLUTION CONTROL HEARINGS BOARD**

16
17 BILL CLARKE, Presiding

18 WILLIAM H. LYNCH, Member
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20
21